United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-4163

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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P/S

G. DOUGLAS BURCK and MARJORIE W. BURCK, Petitioners - Appellants	)	
vs.	)	Docket No. 75-4163
COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee	)	

APPEAL FROM DECISION OF THE TAX COURT

Appendix
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BRIEF FOR APPELLANTS

Bradford S. Magill
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Of Counsel:

Magill, Badger, Fisher, Cohen & Barnett
Joseph W. Barnett, Jr.

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BRIEF

I. Statement of the Issue

Is a cash basis taxpayer entitled to deduct, in the year of actual payment, interest on borrowed money prepaid for a period of one year?

II. Statement of the Case

This case arises from the disallowance by the Appellee (Commissioner) of a deduction of $377,202.00 interest on a bank loan paid by Appellant Burck (Taxpayer) in December, 1969 in advance for a period of twelve months. Taxpayer appealed to the Tax Court, which held (Judge William Fay) that Taxpayer had actually paid the interest but that the Commissioner had not abused his discretion under Section 446(b) of the Internal Revenue Code (Code) in placing this payment on the accrual basis and disallowing all but 3/365 of the payment. Burck v. Commissioner of Internal Revenue, 63 T.C. 556 (1975). The decision was not reviewed by the Tax Court. Taxpayer appealed to this Court, and no cross-appeal was taken by the Commissioner.

The facts are simple and undisputed. Taxpayer maintained records and filed income tax returns consistently, and in the year 1969, on the cash receipts and disbursements method of accounting.

On December 29, 1969, Taxpayer borrowed $3,000,000 from the Bank of the Commonwealth (Bank) a Michigan banking corpora-

tion, bearing interest at the rate of 7% per annum, payable $1,500,000 on or before January 4, 1971 and the balance on or before March 31, 1972, and secured by the pledge of 51,333 shares of letter stock of National Student Marketing Corporation, and in January, 1970 by the pledge of an additional 67,067 shares of such stock pursuant to prior agreement. At the same time Taxpayer executed a demand collateral note payable to the Bank in the amount of $2,388,600, also at 7% interest, and secured by the deposit of the proceeds in a non-interest bearing time deposit account at the Bank.

The proceeds of the first note were paid, according to instructions of the Taxpayer, $2,000,000 as a loan by Taxpayer to Comac Company, a Michigan partnership, and $1,000,000 to Taxpayer's existing account at the First National City Bank in New York (City Bank). This $1,000,000 was subsequently used as follows:

$350,000 loaned to Comac Company, which with the $3,000,000 initially loaned bore interest at the rate of 12% per annum.

$100,000 for the purchase of an interest in Ohio Investment Co., a partnership.

$377,202 for the prepayment of interest for one year on both notes to the Bank, a condition of the loan imposed by the Bank.

$150,000 part payment on the purchase of a personal

residence.

$22,798 retained by Taxpayer.

At the time of the loans, Taxpayer's account at the City Bank had a credit balance of $42,009.02 and his other net assets (exclusive of the pledged stock) were well in excess of the amount of interest prepaid.

The tax return for 1969 showed gross income of $1,049,387.93, far in excess of the gross income reported for 1967 and 1968, the two previous years, due to a long term capital gain in the amount of $968,186.00. After deducting the prepaid interest and other edeuctions, taxable income amounted to $41,383, closely comparable to the taxable income reported for 1967 and 1968 ($46,320.03 and $49,640, respectively).

The actions of the Commissioner and Judge Fay resulted in a tax deficiency of $245,956.55.

Judge Fay found that the interest had been prepaid, in cash, and accordingly determined that under Section 163(a) of the Code, Taxpayer was entitled to an interest expense deduction for 1969. Since the Commissioner did not appeal, there is no question before this Court as to the payment, whether or not the transaction was a sham, or whether or not the money was borrowed for a purposive activity (this Court's Goldstein question is not in issue, 364 F. 2d 734).

The sole concern here is the correctness of Judge Fay's

conclusions (a) that deduction of prepaid interest here would result in a material distortion of the taxable income for the year of payment, (b) that Section 446(b) of the Code permits the Commissioner to place interest on an accrual basis to avoid material distortion of income, and (c) that the Commissioner did not abuse his discretion by the disallowance here involved.

III. Argument

A. The Deduction Did Not Distort Income Within the Meaning of Section 446(b) of the Code.

What is a material distortion of income? The Statute merely says "If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income... ." Income must be clearly reflected. What happened in Burck? Income had been vastly distorted by a non-recurring long term capital gain of almost one million dollars. What could be a greater distortion? The prepayment of interest only served to bring Taxpayer's income in balance with prior years--in effect compensating in part for the previous distortion.

Moreover, it is universally recognized that cash basis accounting always distorts income as compared to the accrual basis, which is designed to match revenues and expenses (emphasis added). For instance, cash accounting permits a business to postpone the recognition of income from accounts receivable, but this has never been attacked successfully by the Commissioner. Indeed, the Tax Court has dismissed challenges by IRS of the right of a

cash basis taxpayer to report income only as actually received, even though income was materially distorted. Sol C. Siegel Productions, Inc., 46 T.C. 15 (1966); W. H. Whi . TCM 8/31/53. So should it be in this case.

We submit it is clearly erroneous to say that an unusual increase in income does not distort, but that an unusual reduction does. The Taxpayer's return as filed in fact clearly reflected income, on a basis consistent with prior years.

B. Section 446(b) of the Code Does Not Grant the Commissioner Authority to Place Interest on an Accrual Basis.

The authority of Section 446(b) is not as broad as some may think. It is limited to a change in method of accounting; "...the computation of taxable income shall be made under such method as, in the opinion of the Secretary or his delegate, does clearly reflect income." Moreover, this Section must be viewed in the light of other Sections of the Code bearing more importantly on the issue.

Section 163 of the Internal Revenue Code provides that, "there shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness." Under Section 7701(a)(25) the words "paid or accrued" are required to be construed in accordance with the taxpayer's method of accounting. Further, Section 446(a) provides that, "taxable income shall be computed under the method of accounting on the basis of which

the taxpayer regularly computes his income in keeping his books." Section 446(c) indicates that one of the permissible methods of accounting is the "cash receipts and disbursements method." Thus, these provisions of the Internal Revenue Code form the general rule that a cash basis taxpayer is allowed to deduct the interest paid on indebtedness from his adjusted gross income in the taxable year the interest is paid.

Under some circumstances, Section 446(b) provides an exception to this general rule in that if the taxpayer's method of accounting does not clearly reflect income then a method which does clearly reflect income must be used in computing taxable income.

It is apparently the Service's position that the material distortion of income test which it believes exists under Section 446(b) should be used in determining whether a prepayment of interest should be allowed in the year of prepayment or allowed in the next taxable year. However, until this case, no court had denied a taxpayer a 12 month prepayment of interest deduction based solely upon the material distortion of income test as applied by the Commissioner.

In 1939, the Commissioner presented the material distortion of income question (in the prepaid interest context) in Fackler v. Commissioner, 39 B.T.A. 395 (1939), Acq. 1939-1 Cum. Bull. 11; Acq. withdrawn in Rev. Rul. 68-643. In Fackler, the taxpayer in 1934 prepaid interest on indebtedness for the years

1935 and 1936. He also prepaid interest in 1935 and 1936. The Commissioner disallowed the deduction in both 1934 and 1935 claiming that such a deduction would work a distortion of his income. The Board reasoned that the postpayment of interest would clearly be deductible in the year of payment and would result in no greater distortion than a prepayment of interest. Furthermore, the Fackler court noted that there were significant business purposes for making the prepayment of interest. One business purpose was to reduce from 5% to 3% the interest rate on the note; the second business purpose was to make a demand note non-callable during the time of the prepayment. Fackler was followed in Court Holding Company v. Commissioner, 2 T.C. 531 (1943).

The Fackler case is controlling on the prepaid interest issue presented here for the reason that the taxpayer in Fackler had a business purpose for prepaying the interest, as did the Taxpayer here, and this is not contested by the Commissioner or Judge Fay.

Apparently recognizing that the material distortion of income test had to be reconciled with the Code's specific approval of the cash basis method of accounting, the Commissioner some years after Fackler issued a ruling stating that the Service would not challenge an interest prepayment which was for no longer than five years. I.T. 3740, 1945 Cum. Bull. 109.

Until the case of Sandor v. Commissioner, 62 T.C. 469 (1974) there do not appear to have been any cases challenging the

prepayment of interest on a material distortion of income theory. The Commissioner in _Sandor_ did challenge the taxpayer's prepayment of interest for a period of five years. Although the _Sandor_ case ostensibly applied the material distortion of income test to this prepaid interest transaction, the Tax Court specifically found that there was _no_ business purpose behind the prepayment of interest other than the securing of a tax deduction.

While the court in _Sandor_ did rely in part on a material distortion of income ground for its holding, a fair reading of that decision makes it clear that the court's holding disallowing the interest deduction was tied to a finding that there was a mere "deposit" and a lack of "purposive activity." In further measuring the significance of the "deposit" and/or the lack of "purposive activity" theories in the court's holding, it is significant that the _Sandor_ court did not overrule either the _Fackler_ or _Court Holding Company_ cases. It is further significant that in every discussion by the _Sandor_ court wherein the material distortion of income theory was mentioned, the court also made reference to the fact that there was no business reason for the prepayment of interest by the taxpayer and in some portions of the opinion referred to the fact that only 90 days of the interest was forfeitable. In the instant case, "purposive activity" is not in issue, and _all_ of the prepaid interest was forfeitable if principal was prepaid.

The importance of factors other than distortion of income

has been the controlling factor for many courts when the issue of the deductibility of prepaid interest was involved. Where a cash basis taxpayer has in the past abused the interest prepayment deduction, courts have been swift to look to the substance of the transaction and, where appropriate, deny the taxpayer the deduction. The major attacks over the years with respect to the disallowance of prepaid interest deductions have occurred in the form of challenges to the bona fides of the transaction giving rise to the prepaid interest deduction where it is "void of commercial reality" or a "sham." See, Ippolito v. Commissioner, 364 F. 2d 744 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967); and Barnett v. Commissioner, 364 F 2d 742 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967). Those cases involved sweepstakes winners who had very large incomes in the year of their winnings. They incurred debts in December of the year of their winnings and prepaid interest on them. Then, in January of the following year, the loan was paid off and most of the interest refunded; however, they sought to retain the benefit of the interest deduction in the year when the interest was prepaid. This Court held that these transactions were void of commercial reality and a sham.

Another case before this Court at the same time as the Ippolito and Barnett cases was Goldstein v. Commissioner, 364 F. 2d 734 (2d Cir. 1966), cert. denied 385 U.S. 1005 (1967). In that case a sweepstakes winner also borrowed money in December

of the year of his winnings. The taxpayer there obtained bank loans for the full purchase price of United States Treasury 1-1/2% notes which were then pledged as security by the taxpayer who prepaid the 4% interest on the loans. This Court held that there was no "purposive activity" which resulted in the prepayment of interest. The deduction for the prepayment of interest, said the court, was proper only when "there is some substance to the loan arrangement beyond the taxpayer's desire to secure the deduction." Id.

These three decisions of this Court are representative of the type of exceptions which have been made to the general rule established by Code Sections 163, 446, and 7701(a) (25) and the Fackler case. It is significant that in none of these cases is the material distortion of income issue raised with respect to the prepayment of interest deduction. It is equally significant that the controlling issues in those cases are not present here.

The Commissioner has generally relied heavily on one phrase contained in Regulation 1.446-1(a) to the effect that "method of accounting" as used in the Statute, includes "the accounting treatment of any item." But this is taken out of context. The balance of this portion of the Regulation provides:

> "Examples of such over-all methods are the cash receipts and disbursements method, an accrual method, combinations of such methods, and combinations of the foregoing with various methods

provided for the accounting treatment of special items. These methods of accounting for special items include the accounting treatment prescribed for research and experimental expenditures, soil and water conservation expenditures, depreciation, net operating losses, etc. Except for deviations permitted or required by such special accounting treatment, taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books."

Read as a whole, this Regulation offers no support whatever for the Commissioner's position in this case. Specific areas of differing treatment are described, but none of them remotely resembles prepaid interest. Perhaps this is why prepaid interest has not been attacked until recently. The real point is that neither Statute nor Regulation gives the Commissioner the arbitrary power he is seeking.

In fact, one wonders if the use of Section 446 is erroneous. The Commissioner here is allocating an expense paid in one year to the succeeding year. Is this not governed by Section 461, which deals with the taxable year of deduction? It would seem so, but the decision to shun it is understandable.

Section 461(a) provides:

"(a) GENERAL RULE.- The amount of any deduction or credit allowed by this subtitle shall be taken for the taxable year which is the proper taxable year under the method of accounting used in computing taxable income."

There are various special rules dealing with death and the accrual of taxes, but nothing relating to distortion of income, except an interesting and significant provision regarding

amounts paid on certain deposits or withdrawable accounts:

> "(e) DIVIDENDS OR INTEREST PAID ON CERTAIN DEPOSITS OR WITHDRAWABLE ACCOUNTS.- Except as provided in regulations prescribed by the Secretary or his delegate, amounts paid to, or credited to the accounts of, depositors or holders of accounts as dividends or interest on their deposits or withdrawable accounts (if such amounts paid or credited are withdrawable on demand subject only to customary notice to withdraw) by a mutual savings bank not having capital stock represented by shares, a domestic building and loan association or a cooperative bank shall not be allowed as a deduction for the taxable year to the extent such amounts are paid or credited for periods representing more than 12 months. Any such amount not allowed as a deduction as the result of the application of the preceding sentence shall be allowed as a deduction for such other taxable year as the Secretary or his delegate determines to be consistent with the preceding sentence."

Quite clearly the Congress knows how to deal with the distortion problem in the area it concentrated upon. Obviously, Congress can do the same thing with prepaid interest if it so desires; but to date it has not chosen to do so, and we see no reason why this Court should bless the Commissioner's bold attempt to legislate in an area not covered by legislative action.

C. Whatever Discretion the Commissioner May Have Was Abused by the Disallowance of the Deduction.

Even admitting *arguendo* that Section 446(b) gives the Commissioner some discretion in prepaid interest cases, we submit it does not extend to the situation in the instant case.

Certainly our facts are governed by *Fackler*, *supra*, which has never been overruled. Therefore, the Commissioner must rely on a 1968 Ruling, *Rev. Rul. 68-643,* which revoked the

prior acquiescense in Fackler, and provided that any prepayment of interest beyond the end of the taxable year succeeding the year of prepayment would be conclusively considered to distort income and would be disallowed as a deduction, and that in other cases:

> "A deduction for interest paid in advance on each indebtedness for a period not in excess of 12 months of the taxable year immediately following the taxable year in which the prepayment is made will be considered on a case by case basis to determine whether a material distortion of income has resulted. Some of the factors to be considered in determining whether the deduction of prepaid interest gives rise to a material distortion of income include but are not limited to the amount of income in the taxable year of payment, the income of the previous taxable years, the amount of prepaid interest, the time of payment, the reason for prepayment, and the existence of a varying rate of interest over the term of the loan."

In the Tax Court, Judge Fay correctly decided that the Ruling does not carry the force of law, nor bind the Court in any way, and is but a useful guide. However, in the next breath, Judge Fay bases his decision that income was distorted on five of six factors set forth in the Ruling. Let us examine them.

1. The amount of income in the taxable year of payment. Admittedly, absent the prepaid interest deduction, income was far greater than in the two prior years, due solely to the distortion caused by a large long term capital gain. Is this meaningful? On the contrary, placing the interest deduction on an accrual basis causes an extreme distortion in the following year, 1970, by creating a loss of over $300,000 which is not

beneficial to the Taxpayer since it is not an operating loss and therefore under 172(d)(4) of the Code does not become part of a net operating loss for carry-back purposes. Of course, this assumes there was not a comparable bulge in 1970 income--indeed if there had been, Taxpayer would not have litigated the issue. So, reliance on this factor relegates a statutory deduction to utter insignificance (emphasis added).

2. The fact that the transaction occurred at the end of the year. This is a weak reed on which to rely. The record clearly shows (and it is not disputed) that the Bank required the prepayment as a condition to the loans, because it demanded the income to offset losses sustained earlier in the year. It seems to us selfevident that the transaction could not have been arranged earlier in the year. The collateral situation is also significant. Of the 118,000 shares of stock eventually securing the loan, only 51,000 shares were owned by the Taxpayer in 1969, and the balance were received and pledged by him in January, 1970. At the time of the loan the 51,000 shares had a maximum value of about $200,000 less than the $3,000,000 principal amount of the loan. Clearly, the Bank did not wish to be under-collateralized longer than a few weeks. Moreover, if the transaction had occurred earlier in 1969, and the interest until the end of 1970 had been prepaid, there would have been a much greater deduction, or what the Commissioner calls distortion. This factor is meaningless.

3. Petitioner's concession that the deduction was

considered. This factor was taken from our brief, which stated that "Petitioners here concede that the interest deduction available to them from the prepayment of interest on the loan transactions was one of their 'mixed motives' in negotiating the transactions." But we went on to say "Their chief purpose, however, was to obtain funds which they could invest at a rate of return higher than their interest costs. That they did so invest is not disputed. By borrowing the funds and pledging their extensive stock holdings as collateral, they could increase their investments without selling assets already held." The full statement is different than the small part pulled out of context. Obviously it would be disingenuous to deny any tax motivation in any transaction giving rise to a tax benefit, but neither this Court nor the Supreme Court has ever frowned on such motivation provided there was substance to the transaction. Knetsch v. United States, 364 U.S. 361,365 (1960), Gregory v. Helvering, 293 U.S. 465, 469 (1935). Neither the Commissioner nor the Court attempted to impugn the substance of the transaction. As Judge Fay said:

> "We point out at this juncture that the loan transaction here was not a sham. See Knetsch v. United States, 364 U.S. 361 (1960); and Max Barnett v. Commissioner, 364 F. 2d 742 (C.A. 2, 1966), affirming 44 T.C. 261 (1965); nor has respondent argued or do we consider whether the money was borrowed in order to further any 'purposive activity' other than obtaining a tax deduction. See Goldstein v. Commissioner, 364 F. 2d 734 (C.A. 2, 1966) affirming 44 T. C. 284 (1965), certiorari denied 385 U.S. 1005 (1967)."

The other factor referred to in the Ruling is the existence of a varying rate of interest over the term of the

loan, which did not exist in the instant case.

We submit that Judge Fay's opinion lends no support to his conclusion; and the only cases he cites for this conclusion are Andrew A. Sandor, supra, a 5 year prepayment case, and Stice v. United States, which was decided by a jury in favor of the taxpayer.

Therefore, we must proceed to the broader issue of the validity and effect of the Ruling. One commentator has made the following observation:

> "In the series of decisions from Fackler to Goldstein and its companion cases, the courts have established the proposition that a prepayment of interest in the normal routine loan transaction is deductible in the year of payment, except where the loan transaction has no substance and is a 'sham' or where the transaction indicates no 'purposive activity' other than the desire to secure a tax deduction. In none of the three opinions which establish this exception was it suggested that the disallowance rests upon the distortion of income resulting from the deduction of prepaid interest."

Gabinet, The Interest Deduction: Several New Installments in a Continuing Saga, 21 Case W. Res. L. Rev. 466, 470 (1970).

Based upon the fact that the Fackler case has not been overruled and the fact that until this case no court has applied the material distortion of income test to the prepayment of interest for 12 months or less, it is apparent that Rev. Rul. 68-643, and the authority granted the Commissioner under Section 446(b), are only operative when there is no "purposive activity" or the transaction giving rise to the prepaid interest deduction

for 12 months or less is a "sham." In other words, the test under this Revenue Ruling and Section 446(b) is that a material distortion of income can be considered to have occurred only when there is no "purposive activity" or the transaction is a "sham." Where there is "purposive activity," and there is a business reason behind the prepayment of interest, and, further, the transaction is entered into for profit and not a "sham," then the cash basis taxpayer is entitled to the deduction for interest prepaid for 12 months or less.

This general approach was approved by Professor Gabinet in his article at 31 Case W. Res. L. Rev. 466, 477. There he stated that, "given the Code's approval of cash basis accounting, the Fackler and Court Holding Company cases are indications of judicial support for the deduction of prepaid interest in a 'clean' transaction. In the questionable transaction, the Goldstein approach of disallowance when tax avoidance is the only discernible motive is superior to the pro rata accrual contained in Revenue Ruling 68-643."

Fundamentally, the cash basis method of accounting specifically sanctioned by the Code must be reconciled with the distortion of income test. We firmly believe that it is not within the spirit or letter of the statutory or case law to deny a deduction for 12 months prepaid interest to cash basis taxpayers where, as here, there was a valid business reason for making the prepayment in connection with a transaction which gives rise to purposive activity.

Professor Gabinet makes further significant remarks at page 42 of his article:

> "It is interesting to note that where a cash basis taxpayer receives prepaid income, it has not been suggested that he should defer its taxability to the year in which he will earn it by providing either goods or services; on the contrary, a taxpayer is required to include in his income any amount which is <u>received</u> during the taxable year unless his method of accounting calls for inclusion as of a different period. This principle applies to both cash basis and accrual basis taxpayers. As to cash basis taxpayers, it is generally interpreted to mean that actual receipt under a claim of right requires inclusion of the receipt in the taxable year in which it is paid, although it may be allocable to future tax years. It seems odd that in the name of proper matching of items of income and expense, a cash basis taxpayer engaged in a routine business transaction should be required to report all prepaid income and to defer most prepaid expenses. With respect to interest prepayments, it seems doubly strange that the lendor, if he is a cash basis taxpayer, should be required to report the entire prepayment as income in the year of receipt, whereas the borrower, also a cash basis taxpayer, should be required to pro rate the payment over the life of the loan. Granted, symmetrical treatment of both taxpayers is not required and is perhaps undesirable where policy considerations cut across the dictates of accounting method and procedure, but in the limited range of transactions to which Revenue Ruling 68-643 will probably not apply, it seems that there is no important policy consideration requiring such asymmetry. A general dislike for cash basis accounting is not a sufficient reason for forcing deferral of all prepaid expenses and immediate inclusion of all prepaid income, regardless of the taxpayer's accounting method."

From the above, it is clear that prepaid interest, at least to the extent claimed in <u>Fackler</u>, is deductible by a cash basis taxpayer, assuming that the transaction giving rise to the prepaid interest deduction is not a "sham" and involves "purposive activity." It has been based upon the lines of

decisions from Fackler on, including the modifications made by this Court. It is submitted that such a deviation from this line of authority, particularly in the situation where the prepayment of interest is for a period not exceeding twelve months, is unwarranted.

We feel compelled to the conclusion that in this 1968 ruling the Commissioner has attempted to give himself the unbridled license to repeal a statutory deduction. Certain it is that if he is upheld in this case, there can be no case whatever for the deduction of interest prepaid beyond the tax year of payment. For despite the fact that the ruling purports to put 12 month (beyond the end of the year of payment) prepayments on a case by case basis, the action of the Commissioner in this case clearly demonstrates his basic thesis that all prepayments must be put on the accrual method (emphasis added).

This is not to say that the Commissioner does not have the correct solution to a complex tax problem. It is to say, and with conviction, that if this solution is desired, it must be provided by the Congress in a statutory provision which we can all see and understand, not left to the whim of a member of the executive branch of government.

IV. Conclusion.

We believe we have demonstrated as a matter of law

(1) That there was no material distortion of income in greater degree than in any cash method situation;

(2) that the Code does not give the Commissioner authority to place the statutory interest deduction of Section 163(a) on an accrual mathod, and

(3) that if the Commissioner has any discretion, it was abused beyond any claim of right or equity in the instant case.

For any one or all of these reasons, we respectfully urge the Court to reverse the decision of the Tax Court and order that the Taxpayer's Federal Income Tax Return for the calendar year 1969 be accepted as filed.

Respectfully submitted,

Bradford S. Magill

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ADDENDUM

Statutes

Section 163(a) General Rule. - There shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness.

Section 172(d)(4) Nonbusiness Deductions of Taxpayers Other Than Corporations. - In the case of a taxpayer other than a corporation, the deductions allowable by this chapter which are not attributable to a taxpayer's trade or business shall be allowed only to the extent of the amount of the gross income not derived from such trade or business.

Section 446(a) General Rule. - Taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books.

(b) Exceptions. - If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary or his delegate, does clearly reflect income.

(c) Permissible Methods. - Subject to the provisions

of subsections (a) and (b), a taxpayer may compute taxable income under any of the following methods of accounting -

(1) the cash receipts and disbursements method;

(2) an accrual method;

(3) any other method permitted by this chapter; or

(4) any combination of the foregoing methods permitted under regulations prescribed by the Secretary or his delegate.

(d) Taxpayer Engaged In More Than One Business. - A taxpayer engaged in more than one trade or business may, in computing taxable income, use a different method of accounting for each trade or business.

(e) Requirement Respecting Change Of Accounting Method. - Except as otherwise expressly provided in this chapter, a taxpayer who changes the method of accounting on the basis of which he regularly computes his income in keeping his books shall, before computing his taxable income under the new method, secure the consent of the Secretary or his delegate.

Section 7701(a)(25) Paid Or Incurred, Paid Or Accrued. - The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the taxable income is computed under subtitle A.

Regulations

Section 1.163-1 Interest deduction in general. - (a) Except as otherwise provided in sections 264 to 267, inclusive, interest paid or accrued within the taxable year on indebtedness shall be allowed as a deduction in computing taxable income. For rules relating to interest on certain deferred payments, see section 483 and the regulations thereunder.

Section 1.446-1(a)(1) General rule for methods of accounting - (a) General Rule. (1) Section 446(a) provides that taxable income shall be computed under the method of accounting on the basis of which a taxpayer regularly computes his income in keeping his books. The term "method of accounting" includes not only the over-all method of accounting of the taxpayer but also the accounting treatment of any item. Examples of such over-all methods are the cash receipts and disbursements method, an accrual method, combinations of such methods, and combinations of the foregoing with various methods provided for the accounting treatment of special items. These methods of accounting for special items include the accounting treatment prescribed for research and experimental expenditures, soil and water conservation expenditures, depreciation, net operating losses, etc. Except for deviations permitted or required by such special accounting treatment, taxable income shall be computed under the method

of accounting on the basis of which the taxpayer regularly computes his income in keeping his books.

Rulings

Rev. Rul. 68-643, 1968-2 C.B. 76

SECTION 163. - INTEREST

26 CFR 1.163-1: Interest deduction in General.

Rev. Rul. 68-643[1]

(Also Sections 446, 7805; 1.446-1, 301.7805-1.)

Reconsideration has been given to I.T. 3740, C.B. 1945, 109, concerning the question whether interest paid in advance is deductible for Federal income tax purposes for the year in which paid.

I.T. 3740 was based upon a transaction in which the taxpayer paid interest in advance for a period of five years. As to such transaction, I.T. 3740 holds that where a taxpayer keeps books of account and files Federal income tax returns on the cash receipts and disbursements method of accounting, interest paid in advance for a period of 5 years is deductible for the year in which paid, but where the accrual method of accounting is used in reporting income, interest is deductible for the year in which the liability to pay accrues irrespective of when payment is actually made.

Section 163 of the Internal Revenue Code of 1954 provides,

1 Also released as Technical Information Release 1001, dated November 26, 1968.

in general, that there shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness.

Section 446(a) of the Code provides that taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books. Section 446(b) of the Code provides, in part, that if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary or his delegate, does clearly reflect income.

As to taxpayers employing the accrual method of accounting, consistent with the position stated in I.T. 3740, interest accrues ratably over the period of the loan and is allowable as a deduction ratably over this period, irrespective of when paid.

In view of certain abuses which have arisen with respect to prepayment of interest by taxpayers using the cash receipts and disbursements method of accounting, the Service has reexamined its position in I.T. 3740. The Service now concludes that the deduction of prepaid interest in the year of payment by a taxpayer employing the cash receipts and disbursements method of accounting may not result in a clear reflection of income for the taxable year of payment. A deduction for interest paid in advance on each indebtedness for a period not in excess of 12 months of the taxable year immediately

following the taxable year in which the prepayment is made will be considered on a case by case basis to determine whether a material distortion of income has resulted. Some of the factors to be considered in determining whether the deduction of prepaid interest gives rise to a material distortion of income include but are not limited to the amount of income in the taxable year of payment, the income of previous taxable years, the amount of prepaid interest, the time of payment, the reason for prepayment, and the existence of a varying rate of interest over the term of the loan. If interest is prepaid for a period extending more than 12 months beyond the end of the current taxable year, the deduction of such prepaid interest in the taxable year of payment will be considered as materially distorting income. Where a material distortion of income has been found to result from the deduction of prepaid interest, the Service will require the taxpayer to change his method of accounting with respect to such prepaid interest in order to allocate it over the taxable years involved.

In view of the foregoing, I.T. 3740 is revoked. However, pursuant to the authority contained in section 7805(b) of the Code, this Revenue Ruling will be applied without retroactive effect to interest prepayments for periods not in excess of five years made prior to November 26, 1968 by taxpayers employing the cash receipts and disbursements

method of accounting. This Revenue Ruling also will be applied without retroactive effect to an interest prepayment for a period not in excess of five years made on or after November 26, 1968, by a taxpayer employing the cash receipts and disbursements method of accounting, pursuant to a legal obligation incurred prior to such date to make such prepayment.

The Service will no longer follow the contrary decisions in John D. Fackler v. Commissioner, 39 B.T.A. 395 (1939), acquiescence, C.B. 1939-1 (Part I), 11, and Court Holding Co. v. Commissioner, 2 T.C. 531 (1943), acquiescence, C.B. 1943, 5. Acquiescence in each of those court decisions is being withdrawn and nonacquiescence substituted therefor. See page 3, this Bulletin.

APPENDIX

1. Docket Entries in Tax Court.

2. Opinion of Judge Fay.

3. The Decision.

G. DOUGLAS BURCK AND MARJORIE W. BURCK,
Petitioners
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Tax Court Docket No. [illegible]909-72

	Document No.
Docket entries	1
Petition	2
Request for place of trial - Granted	3
Answer	4
Notice setting case for trial 11/5/73	5
Minutes of proceedings before the Tax Court 11/5/73	6
Stipulation of facts with attached exhibits 1-A thru 18-R	7
Petitioner's exhibit 19 admitted in evidence	8
Transcript of proceedings before the Tax Court 11/5/73	9
Findings of fact and opinion	10
Agreed computation	11
Decision	12
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Notice of filing notice of appeal	14
Notice of assembling and date for transmission of record	15

* * * * * * * *

UNITED STATES TAX COURT

GENERAL DOCKET

DOCKET NO. 8909-72

G. DOUGLAS BURCK AND MARJORIE W. BURCK 102 Greenwich Avenue Greenwich, Connecticut 06830 PETITIONER, VS. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.	APPEARANCES FOR PETITIONER: NAME Bradford S. Magill, (Magill, Badger, Fisher, Cohen & Barnett) 49 West Putnam Avenu Greenwich, Conn. 06830 ADDRESS

Date Month Day Year	Filings and Proceedings	Action	Served
Dec. 5, 1972	PETITION FILED: FEE PAID Dec. 5, 1972		Dec. 6, 1
Jan. 30, 1973	REQUEST by Resp. for trial at New Haven, Conn.	GRANTED Feb. 5, 1973	Feb. 5, 19
Jan. 30, 1973	ANSWER by Resp. filed		Feb. 5, 19
Aug. 3, 1973	NOTICE OF TRIAL on Nov 5, 1973 at Bridgeport,	Conn.	Aug. 3, 19
Nov. 5, 1973	TRIAL at Bridgeport, Conn. before Judge Fay.		
	Stipulation of Facts filed with Jt. Exh. attached.		
	ORIGINAL BRIEFS DUE - December 20, 1973		
	REPLY BRIEFS DUE - January 21, 1974		
	SUBMITTED TO JUDGE FAY		
Nov. 29, 1973	TRANSCRIPT of Nov. 5, 1973 rec'd.		
Dec. 20, 1973	BRIEF for Respondent filed.		DEC 27 19
Dec. 26, 1973	BRIEF for Petr. filed. (Timely Postmarked)		DEC 27 19
Jan. 21, 1974	REPLY BRIEF for Resp. filed.		JAN 23 197
Jan. 23, 1974	REPLY BRIEF for Petitioner filed. (timely postmarked)		Jan. 23, 1974
Feb. 13, 1975	FINDINGS OF FACT AND OPINION filed, Judge Fay,		FEB 14 197
	(Decision will be entered under Rule 155).		
Apr. 30, 1975	AGREED COMPUTATION filed.		
May 6, 1975	DECISION entered, Judge Fay.		May 6, 19
	APPELLATE PROCEEDINGS		
	(continued on page 2)		

Form No.
May 19

CKET NO. 8909-72

(Continuation)

G. DOUGLAS BURCK AND MARJORIE W. BURCK,		PETITIONER	PAGE 2
Date Month Day Year	Filings and Proceedings FAY	Action	Served
ly 28, 1975	NOTICE OF APPEAL to U.S.C.A., 2nd Cir., filed by Petrs		July 29, 1975
ly 29, 1975	NOTICE of Filing with copy of notice of appeal sent to Mr. Meade Whitaker, Chief Counsel.		July 29, 1975
ly 29, 1975	NOTICE, to parties, of assembling and date for transmission of the record.		July 29, 1975

63 T. C. No. 53

UNITED STATES TAX COURT

G. DOUGLAS BURCK and MARJORIE W. BURCK, Petitioners
v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 8909-72 **Filed February 13, 1975.**

Petitioner, a cash-basis taxpayer, borrowed from a bank, late in the calendar year, amounts totalling $5,388,600. Of this amount $1,000,000 was added to petitioner's bank account. On December 30, 1969, one day after petitioner's receipt of the borrowed funds, pursuant to the negotiations culminating in the loan, the amount of $377,202, representing one year's interest on the loans, was debited to petitioner's bank account and transferred to the creditor bank. Petitioners deducted this amount on their 1969 tax return under section 163(a). Respondent disallowed the deduction claiming the loan transaction constituted a discounted loan; or, in the alternative, under section 446, that an interest deduction in excess of 3/365 of the above amount would materially distort income for 1969.

Held, petitioners paid $377,202 as an interest expense in 1969 under section 163(a). Newton A. Burgess, 8 T.C. 47 (1947) followed.

Held further, respondent did not abuse his authority under section 446 by disallowing the major portion of the deduction for prepaid interest in order to clearly reflect petitioners' income for 1969.

Bradford S. Magill, for the petitioners.

Robert S. Walker, for the respondent.

FAY, Judge: Respondent determined a deficiency in the Federal income tax of petitioners for the taxable year 1969 in the amount of $245,956.55.

The primary issue for decision is whether the petitioners have prepaid one year's interest or have in substance received a discounted loan in which no interest was paid during the taxable year in question. If the former, we must then determine whether a deduction in excess of 3/365 of the interest paid during the taxable year would result in a material distortion of income.

FINDINGS OF FACT

Certain facts have been stipulated and are found accordingly. The stipulation of facts and exhibits attached thereto are incorporated herein by this reference.

Petitioners, G. Douglas Burck and Marjorie W. Burck, husband and wife, maintained their residence in Malawi, Africa, when the petition herein was filed. They timely filed a joint Federal income tax return for the taxable year ended December 31, 1969. Any reference to "petitioner" hereinafter shall be deemed to mean G. Douglas Burck.

Petitioners maintained their books and records and filed their income tax return for the taxable year 1969 on the cash receipts and disbursements method of accounting.

After negotiations, the petitioner entered into a loan agreement with the Bank of the Commonwealth (the Bank), a Michigan banking corporation, on December 23, 1969. The agreement was consummated on December 29, 1969, when petitioner executed a secured promissory term note in the amount of $3,000,000, made payable to the order of the Bank and bearing interest at a rate of 7 percent per annum payable monthly. One million five hundred thousand dollars of the principal was payable on or before January 4, 1971; the balance on or before March 31, 1972.

The term note was secured by the pledge of 51,333 shares of letter stock of the National Student Marketing Corporation and an agreement to pledge all additional such shares received by petitioner on or before January 30, 1970. Pursuant to such agreement 67,067 additional shares were pledged on January 20, 1970.

Pursuant to the loan agreement petitioner also executed a demand collateral note made payable to the Bank in the amount of $2 388,600. Interest was payable at the rate of 7 percent per annum. The proceeds of said collateral note were placed in a non-interest bearing time deposit account at the Bank as security for the collateral note.

By letter authorization from petitioner the proceeds of the term note were wire transferred by the Bank on December 29, 1969, as follows:

> $2,000,000 to the Birmingham Bloomfield Bank in Michigan for credit to the account of Comac Company. 1
>
> $1,000,000 to the First National City Bank in New York (First National) for credit to petitioner's previously existing bank account. 2

As per the negotiations preceding the loan agreement of December 23, 1969, and at the direction of petitioner First National debited his account by the amount of $377,202[3] and transferred said amount to the Bank on December 30, 1969.[4]

1
This amount was loaned to the Comac Company, a partnership in which petitioners had no direct or indirect interest except as creditors.

2
On December 29, 1969, petitioner's bank account at the First National City Bank in New York contained a credit balance of $42,009.02.

3
This amount represented one year's interest in both the term note and the collateral note.

4
At the time when this amount was transferred to the Bank petitioner's assets, exclusive of cash, stock of National Student Marketing Corporation and miscellaneous tangible personal property, less liabilities, were well in excess of $377,202.

The proceeds of the $3,000,000 term note were subsequently invested as follows:

Amount	Use
$2,350,000	Loaned to Comac Company [5]
100,000	Purchased an interest in Ohio Investment Co., a partnership
377,202	Paid to the Bank as interest on the term note and collateral note
150,000	Part payment on the purchase of a personal residence
22,798	Retained by petitioner

On their joint Federal income tax return for 1969 petitioners reported gross income of $1,049,387.93.[6] Included in this figure is a long-term capital gain realized in the amount of $968,186.00. The petitioners claimed as one of several offsets to gross income the amount of $377,202 paid to the Bank on December 30, 1969, as an interest expense deduction. The amount reported as taxable income was $41,383.

By statutory notice dated September 14, 1972, respondent disallowed the above deduction.

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[5] This amount was represented by two demand notes bearing interest at the rate of 12 percent per annum.

[6] This amount is far in excess of petitioner's gross income for the years 1967 and 1968.

OPINION

Our first consideration is whether petitioner, a cash-basis taxpayer, prepaid one year's interest on certain loans so as to be entitled to an interest expense deduction in the year 1969.

Section 163(a) of the Internal Revenue Code of 1954[7] provides "there shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness." It is essential that actual payment be made by a cash-basis taxpayer if he is to be entitled to the deduction afforded by section 163(a). Clinton H. Mitchell, 42 T.C. 953 (1964).

Interest deductions are denied to cash-basis taxpayers where the interest obligation is satisfied by the taxpayer's note rather than cash. Nat Harrison Associates, Inc., 42 T.C. 601 (1964); James W. England, Jr., 34 T.C. 617 (1960). Similarly there is no payment of interest under section 163(a) when a cash-basis taxpayer receives a discounted loan. John C. Cleaver, 6 T.C. 452 (1946), affirmed 158 F.2d 342 (C.A. 7, 1946), certiorari denied 330 U.S. 849 (1947). That is, when a creditor withholds a certain sum from the face amount of a loan as interest,

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7 All section references are to the provisions of the Internal Revenue Code of 1954 in effect during the taxable years in issue.

making available only the loan proceeds in excess of the interest obligation, there is no payment of interest by the debtor until actual repayment of the loan. John Randolph Hopkins, 15 T.C. 160, 180-182 (1950).[8]

Petitioner here argues that there was actual payment of interest in the year 1969. Accordingly, he contends that a deduction under section 163(a) should be forthcoming. Respondent, on the other hand, argues that in substance the transaction in question constituted a discounted loan. Accordingly, he maintains that no interest expense deduction should be allowed in the year 1969. We agree with petitioner.[9]

Upon receipt of the loan proceeds petitioner directed that the borrowed money be deposited in his already existing bank account commingling it with the $42,009.02 in the account. Thereafter one year's interest on the loans was prepaid in cash from this source. These facts are clearly within the scope of our decision in Newton A. Burgess, 8 T.C. 47 (1947).

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8 See also Burton Foster, T.C. Memo. 1973-53 and Rev. Rul. 75-12 I.R.B. 1975-2, 6

9 We point out at this juncture that the loan transaction here was not a sham. See Knetsch v. United States, 364 U.S. 361 (1960); and Max Barnett v. Commissioner, 364 F.2d 742 (C.A. 2, 1966), affirming 44 T.C. 261 (1965); nor has respondent argued or do we consider whether the money was borrowed in order to further any "purposive activity" other than obtaining a tax deduction. See Goldstein v. Commissioner, 364 F. 2d 734 (C.A. 2, 1966), affirming 44 T.C. 284 (1965), certiorari denied 385 U.S. 1005 (1967).

In Burgess the taxpayer borrowed amounts totalling $203,988.90. Interest on this amount, to be prepaid, totalled $4,136.44. Just prior to the due date of the interest the taxpayer borrowed an additional $4,000.00, from the same creditor. The sum was deposited in his bank account, commingling it with his other funds. Shortly thereafter the taxpayer drew a check on this account in the amount of $4,219.33 to cover the interest payment due.[10] The Commissioner contended that the cash basis taxpayer had in effect merely substituted a note in place of the interest payable, and disallowed the interest deduction. We disagreed and held as follows:

> [The interest due] was one of several bills due in December. The cash received by the petitioner from the proceeds of his $4,000 loan was commingled with his other funds in the trust company. Its identity was lost ***. The petitioner made a cash payment of interest as such. [8 T.C. 47, 50.]

Additionally we point out that the loan proceeds were not required for petitioner to make the interest payment. Petitioner maintained ownership of substantial assets from which the interest could have, if need be, been prepaid.[11] Moreover, the prepayment of interest here was an

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10
The additional $82.89 represented prepaid interest on the $4,000 loan.

11
See the dissenting opinions of Judge McMahon and Judge Leech in S. E. Thomason, 33 B.T.A. 576 (1935).

integral part of the loan agreement. The bank would not have proceeded with the loan agreement were it not for the prepayment of interest.[12] We consider the above indicia of a cash payment of interest for purposes of section 163(a).

Notwithstanding the above, respondent relies on our decision in John C. Cleaver, supra, to support his position. In Burgess we distinguished Cleaver in a manner appropriate here:

> The situation in this case differs from that in John C. Cleaver, *** where the bank computed interest for five years on the principal amount of each note and deducted the interest so calculated from the principal amount of each note and made the balance available to the taxpayer. Obviously, the interest in the Cleaver case never went through the hands of the borrower and never passed through his bank account. *** [8 T.C. 47, 50.]

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[12] The Bank required a prepayment of interest so as to offset certain deductions in 1969 which were larger than its taxable income.

Also, see in regards to a bona fide arm's-length negotiation and subsequent loan transaction Bayou Verret Land Co., 52 T.C. 971, 986 (1969) affirmed on this issue 450 F. 2d 850 (C.A. 5, 1971); and also Rev. Rul. 63-57 1963-1 C.B. 103.

For all of the reasons stated, we hold petitioner to have prepaid, in cash, interest on certain loans. Accordingly section 163(a) will permit petitioner an interest expense deduction for the taxable year 1969.

In light of our holding we must determine whether an allowance of the interest expense deduction in excess of 3/365[13] of the interest paid would result in a material distortion of income for the taxable year 1969.

Relying on his authority under section 446, respondent has disallowed a deduction for all but 3/365 of the above interest expense in 1969 on the ground that it would materially distort petitioner's income; he would allow petitioners the deduction in 1970, the interest being allocable to said year.

Section 446(b) grants to the respondent broad powers and discretion to determine whether an accounting method employed by a taxpayer clearly reflects income. Commissioner v. Hansen, 360 U.S. 446 (1959); Fort Howard Paper Co., 49 T.C. 275 (1967); Photo-Sonics, Inc., 42 T.C. 926 (1964), affirmed 357 F.2d 656 (C.A. 9, 1966). "The term 'method of accounting' includes not only the overall method of accounting of the taxpayer but also the accounting treatment of any item." Section 1.446-1(a), Income Tax Regs. It is the taxpayer's burden of proof to establish

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13 Respondent concedes that 3/365 of the interest paid would unquestionably be allowed.

that the Commissioner has abused his discretion in a determination of whether the treatment of a certain item results in a material distortion of the taxpayer's income. Fort Howard Paper Co., supra; Photo-Sonics, Inc., supra; Michael Drazen, 34 T.C. 1070 (1960).

With particular regard to whether the prepayment of interest distorts income the respondent has, with reliance on section 446(b), issued Revenue Ruling 68-643, 1968-2 C.B. 76, 77. It states in part as follows:

> The Service now concludes that the deduction of prepaid interest in the year of payment by a taxpayer employing the cash receipts and disbursements method of accounting may not result in a clear reflection of income for the taxable year of payment. A deduction for interest paid in advance on each indebtedness for a period not in excess of 12 months of the taxable year immediately following the taxable year in which the prepayment is made will be considered on a case by case basis to determine whether a material distortion of income has resulted. Some of the factors to be considered in determining whether the deduction of prepaid interest gives rise to a material distortion of income include but are not limited to the amount of income in the taxable year of payment, the income of previous taxable years, the amount of prepaid interest, the time of payment, the reason for prepayment, and the existence of a varying rate of interest over the term of the loan. *** Where a material distortion of income has been found to result from the deduction of prepaid interest, the Service will require the taxpayer to change his method of accounting with respect to such prepaid interest in order to allocate it over the taxable years involved.

We emphasize that although there is legislative support for the approach taken in the Revenue Ruling, we consider it advisory only. H. Rept. No. 91-413, 91st Cong., 1st Sess., p. 73 (1969) (1969-3 C.B. 246); see also Andrew A. Sandor, 62 T.C. 469 (1974). It does not carry the force of law, nor bind this Court in the slightest degree. Andrew A. Sandor, supra; see also United States v. Hall, 398 F.2d 383 (C.A. 8, 1968); Stubbs, Overbeck & Associates v. United States, 445 F.2d 1142 (C.A. 5, 1971). The Revenue Ruling is but a useful guide, outlining some of the factors to be considered in a determination of whether the prepayment of interest in a particular case results in a material distortion of income under section 446(b).

After reviewing all of the facts and circumstances of the matter at hand we hold that a deduction for the prepayment of interest would result in a distortion of the taxable income for the year of payment. We make this determination by noting, inter alia, the following: In 1969 petitioner realized a long-term capital gain in the amount of $968,186.00, an amount far in excess of the gross income of petitioner in the two prior years; the prepayment of interest in the amount of $377,202.00 on December 30, 1969 based on loans to petitioner

one day earlier in the amount of $5,388,600.00; and, in addition, petitioner has conceded that one of his motivations in borrowing the funds was the interest deduction he would receive by the prepayment of interest. See _Andrew A. Sandor_, _supra_; see also _Stice_ v. _United States_, an unreported case (Texas, 1974) 35 A.F.T.R. 2d 75-351, 74-2 U.S.T.C. ¶9791.

For all the reasons stated above, we hold that respondent did not abuse the discretion afforded him under section 446(b) by disallowing all but 3/365 of the interest payment made in 1969 in order to clearly reflect petitioner's income for said year.

Decision will be

entered under Rule 155.

UNITED STATES TAX COURT

G. DOUGLAS BURCK and MARJORIE W. BURCK, Petitioners	)	
v.	)	Docket No. 8909-72
COMMISSIONER OF INTERNAL REVENUE, Respondent	)	

DECISION

Pursuant to the opinion of the Court filed February 13, 1975, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioners for the taxable year 1969 in the amount of $245,956.55.

Judge.

Entered: MAY 6 1975

* * * * * *

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter

this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.

/s/ Bradford S. Magill — Date: April 16, 1975

BRADFORD S. MAGILL
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MEADE WHITAKER
Chief Counsel

By: /s/ Robert B. Dugan — Date: APR 24 1975

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